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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-431

NADINE GODSY,
Appellee,

vs.

SHERMAN M. GODSY, JR.,
Appellant.

ON APPEAL FROM THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

JURISDICTIONAL STATEMENT

JAMES R. WYRSCH
RONALD R. HOLLIGER
1050 Home Savings Building
Kansas City, Missouri 64106
Telephone: (816) 221-0080
Attorneys for Appellant

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

NADINE GODSY,
Appellee,

VS.

SHERMAN M. GODSY, JR.,
Appellant.

ON APPEAL FROM THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

JURISDICTIONAL STATEMENT

Appellant appeals from the final order of the Missouri Court of Appeals, Kansas City District, reversing the judgment of the Circuit Court of Jackson County, Missouri, and reinstating a default judgment of divorce in favor of Appellee. The Order of the Court of Appeals was entered on April 3, 1978. On May 1, 1978 the Missouri Court of Appeals, Kansas City District, overruled Appellant's timely Motion for Rehearing and Transfer to the Supreme Court of Missouri. Thereafter, the Supreme Court of Missouri, on June 15, 1978, denied Appellant's timely filed application to transfer said cause to the Supreme Court of Missouri from the Missouri Court of Appeals, Kansas City District.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Kansas City District, is set forth at Appendix A to this statement.

JURISDICTION

This cause arises from a default judgment of divorce originally entered in the Circuit Court of Jackson County, Missouri. Thereafter, Appellant filed a Motion to Set Aside Judgment in the original cause and a separate equity action. Appellant's Motion and his Petition in Equity asked that the default judgment be set aside. The default judgment had awarded Appellee the sum of One Hundred Thousand Dollars ($100,000.00) alimony in gross, attorney's fees, suit money and One Hundred Fifty Dollars ($150.00) per week as child support. The default judgment was taken against Appellant without Appellant having been notified to appear for a hearing on the divorce matter and without Appellant or his counsel being present at the hearing wherein the default judgment was taken. Appellee took an appeal from the orders setting aside the default judgment and Appellant cross-appealed concerning matters of attorney's fees and the appointment of a receiver for the marital property. The Missouri Court of Appeals, Kansas City District, in its opinion of April 3, 1978, reversed the judgments of the trial court and ordered the default judgment be reinstated.

A Notice of Appeal to this Court was filed in the Missouri Court of Appeals, Kansas City District on September 8, 1978, said Court being the Court wherein the

Court is possessed of the record, all pursuant to Rule 10 of the Rules of this Court. A copy of the Notice of Appeal to the Missouri Court of Appeals, Kansas City District is attached to this Jurisdictional Statement as Appendix B.[1] The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(2). Cases which sustain the jurisdiction of this Court include *Dohnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921); *Fiske* v. *Kansas,* 274 U.S. 380 (1927); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U.S. 313 (1930); *Brinkerhoff-Farris Trust and Savings Co.* v. *Hill,* 281 U.S. 673 (1930); *Railway Express Agency* v. *Virginia,* 336 U.S. 106 (1949); *Lathrop* v. *Donohue,* 367 U.S. 106 (1961).

Alternatively, should this Court determine that an appeal does not lie under 28 U.S.C. 1257(2), Appellant respectfully moves this Court to treat this Jurisdictional Statement as a Petition for Certiorari. 28 U.S.C. 2103. Cases which sustain this alternative procedure are *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Slagle* v. *Ohio,* 366 U.S. 259 (1961).

QUESTIONS PRESENTED BY THIS APPEAL

I. Whether Appellant was denied due process of law, when, without notice, without opportunity to be heard and without the opportunity to be present and to be represented by counsel, the Court entered a default judgment against Appellant in an amount exceeding One Hundred Thousand Dollars ($100,000.00).

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1. A timely Notice of Appeal was also filed with the Supreme Court of Missouri on or about September 11, 1978, should this Court determine that the Missouri Supreme Court is the Court "possessed of the record."

STATEMENT

This appeal stems originally from an action brought initially against Appellant in the Circuit Court of Jackson County, Missouri, for divorce.

After the matter pended for a time, Appellee noticed up Appellant for a hearing on February 15, 1973, with respect to certain motions for temporary support and the like which were pending in the case. There was no notice to Appellant that the matter of the divorce itself would be taken up. Appellant's then counsel was to be out of town, so notified the Appellee's attorney, and notified Appellant not to be present. An associate of Appellant's then attorney appeared on February 15, 1973, before the Trial Court and applied for a continuance on behalf of Appellant. The application for continuance was denied. The Court then and there—without notice to Appellant or his counsel and in fact without Appellant or his counsel even being present—struck Appellant's pleadings and ordered a default hearing on the *divorce* to proceed immediately. Thereupon, Appellee obtained the divorce, a judgment for over One Hundred Thousand Dollars ($100,000.00) in attorney fees, suit money and alimony, and custody of the minor child, together with child support.

Appellant's then counsel subsequently appealed the default judgment; the appeal was dismissed because it was untimely filed. After denial of certiorari by this Court, 423 U.S. 887, Appellant initiated two proceedings attacking the default judgment. After evidentiary hearings the Court sustained both attacks and entered Orders setting aside the default judgment. Appellee subsequently appealed those orders to the Missouri Court of Appeals, Kansas City District. It is the judgment on that appeal that is the subject of this application to this Court.

Robert C. Jones, attorney for Sherman Godsy in the divorce action, testified that during December 1972 and January 1973 he carried on extensive settlement negotiations with Nadine Godsy's attorney. In January, 1973, there were a number of motions for contempt and requests for modifications of temporary alimony and child support allowance earlier made. Prior to February 15, 1973, Mr. Jones received a copy of the court docket for that date indicating that certain motions then pending would be heard by the Court on February 15, 1973. A "contested divorce" hearing was not noted on the docket although it was the custom and practice of the Court Clerk's office to so notate the docket.

Mr. Jones did not understand that the final divorce hearing would be had on February 15, 1973 although he admitted that the date had been discussed as a tentative trial date during January 1973. On January 23, 1973, Jones sent a letter to the Domestic Relations Clerk advising her that the matter might be removed from the docket of February 15, 1973. Jones' belief that only motions were to be heard on that date was reinforced by a letter from Nadine Godsy's attorney, Frank Krenzky, dated January 29, to the Court asking the Court to

> "Please instruct Mary Wren to leave the matter scheduled as you previously directed on the 15th of February and allow as a hearing of *the motions pending* in this cause as soon as the Court's time will allow." (emphasis added).

The pending motions had been continued numerous times and Jones thereafter left for vacation to Hawaii where he was on February 15, 1973. Before leaving he advised Sherman Godsy that no hearing would be held on that date. No other attorneys in Jones' office had worked on the Godsy case or were familiar with the matters involved.

On February 15, 1973, Nadine Godsy and her attorneys appeared in Court. Sherman Godsy did not appear, having been again advised by Jones' law partner that he need not appear. Another attorney in Jones' office, a Mr. Simms, did appear and requested a continuance, which was denied. He advised the Court that Jones was out of town but would be present the first part of the following week. During the discussion concerning the continuance request, Nadine Godsy's attorney indicated that if it had been Simms rather than Jones asking for a continuance to the following week that he would have had no objection.

At the default hearing thereafter held, neither Sherman Godsy, Jones nor any attorney from his office was present. The Court made orders concerning custody and support and entered a decree of divorce. Nadine Godsy testified that the jointly held real property was worth at least Five Hundred Thousand Dollars ($500,000.00); she further testified that the parties' taxable income for 1971 was $40,000.00 to $50,000.00. There was no testimony concerning Sherman Godsy's income during the period between that date and the hearing. At the instant hearing Sherman Godsy testified that his 1972 income was Twenty-three Thousand Six Hundred Fifty-Five Dollars ($23,655.00). At the conclusion of the default divorce hearing the Court awarded Nadine Godsy a judgment for maintenance in gross of One Hundred Thousand Dollars ($100,000.00).

Willie McCann, a qualified appraiser, opined that the jointly held real estate had a fair market value in 1973 of One Hundred Ten Thousand ($110,000.00). Nadine Godsy reiterated her testimony that the property was worth Five Hundred Thousand Dollars ($500,000.00). A Mr. Maynard testified on behalf of Nadine Godsy that he knew of potential buyers who would pay Six Hundred Thousand Dollars ($600,000.00) for the property, although he had *not* discussed price with those potential buyers nor had they, or Maynard, closely inspected the property.

The Appeals Court ruled that the Trial Court erred in setting aside the default judgment and ordered the judgment reinstated. A timely Motion for Rehearing and for Transfer to the Supreme Court of Missouri was denied. Thereafter, Appellant made a timely Application for Transfer to the Supreme Court of Missouri which was denied on June 15, 1978.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented are substantial and of broad public importance. They involve the fundamental guarantee of due process as provided by the Fourteenth Amendment to the United States Constitution and touch upon the rights of litigants everywhere. Most importantly, the questions involved here touch upon the financial livelihood of this Appellant, now facing financial ruin by reason of a judgment of over One Hundred Thousand Dollars ($100,000.00) rendered by default against him.

The question concerns whether without notice and opportunity to be heard a Court may simply strike a party's pleadings and render a judgment against him in an amount of over One Hundred Thousand Dollars ($100,000.00). Under the doctrines as enunciated in *Dohnke-Walker Milling Co.* v. *Bondurant* and *Fiske* v. *Kansas*, cited *supra*, the Court has jurisdiction to hear this appeal. Alternatively, Appellant respectfully requests that this Court consider the matter as a Petition for Writ of Certiorari should the Court decide an appeal does not lie. 28 U.S.C. 1257(2).

1. It Is a Violation of Appellant's Rights Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution to Enter a Default Judgment Against Him Without Notice, Without the Opportunity to Be Heard and Without the Opportunity to Be Present and to Be Represented by Counsel.

The only notice given to Appellant and his then counsel regarding Trial Court action on February 15, 1973, indicated that only motions would be heard. The Court's Notice did *not* indicate that a final hearing would be held on the divorce itself. Appellant's counsel did not appear, nor did Appellant appear, having been advised that it was not necessary for him to do so. However, before one's rights or property are taken from him, due process requires a hearing prior to the seizure and forfeiture. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751; *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406; *Gross* v. *Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725; *Bell* v. *Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90.

The Fourteenth Amendment requires notice and the opportunity for a hearing before one's interest in any type of property is taken away. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale*, 1 Wall. 223, 233.

This right to be heard insures fair play to the individual and protects his use and possession of property from arbitrary encroachment, minimizing unfair or mistaken deprivations of property. "(T)he prohibition against deprivation of property without due process of law reflects the high value, imbedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of government intereference." See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 551.

"The requirement of notice and an opportunity to be heard raises no inpenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State will listen to what he has to say, substantially unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes* v. *Shevin*, 407 U.S. 67, 81.

And, the notice must be sufficient to offer the party subject to deprivation the opportunity to be heard, to prevent any unfair or mistaken deprivations of property. "Due process is afforded only by the kinds of notice and hearing that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property. . . ." *Fuentes, supra,* citing cases.

Under all these facts, Appellant was denied due process of law. The cases cited on the requirement of adequate notice and an adequate hearing with counsel are applicable here. As was said in *Krieber* v. *Krieber*, 420 S.W.2d 376 at p. 379:

> "Notice and a hearing, or an opportunity to be heard, have long been considered essential to due process, to a decision on the merits of a cause and to the deprivation of rights and property."

Those rights and that opportunity have been denied Appellant by the state court decision below.

In conclusion, the question presented is so substantial as to require plenary consideration with brief on the merits and oral argument for its resolution.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

JAMES R. WYRSCH
RONALD R. HOLLIGER
1050 Home Savings Building
Kansas City, Missouri 64106
Telephone: (816) 221-0080
Attorneys for Appellant

APPENDIX

APPENDIX A

JUDGMENT ENTRY SETTING ASIDE DECREE OF DIVORCE

On February 13, 1976 Order sustaining Motion to set aside judgment was filed in the office of the Circuit Clerk. Said Order is as follows:

"ORDER SUSTAINING DEFENDANT'S MOTION TO SET ASIDE JUDGMENT OF FEBRUARY 15, 1973

Now, on this 13th day of February, 1976, the Court, having before it Defendant's Motion to Set Aside this Court's Judgment of February 15, 1973, and having heard and considered the evidence produced by both defendant and plaintiff, and, good cause appearing, it is hereby ordered that Defendant's Motion to Set Aside the Judgment entered on February 15, 1973 in favor of plaintiff is sustained and said Judgment is set aside and for naught held.

IT IS SO ORDERED."

FILED FEBRUARY 13, 1976

On March 2, 1976 Motion for Attorneys' Fees Pendent Lite was filed in the office of the Circuit Clerk, as follows:

"MOTION FOR ATTORNEYS' FEES PENDENTE LITE

Comes now the plaintiff and moves the Court for an award for attorneys' fees, suit money, costs and expenses pendente lite as follows:

1. An award for the services of her attorney James R. Hunsucker performed before February 15th, 1973 in the amount of $4,320.00 plus interest from February 15th, 1973 at the rate of 6% per annum.

2. An award for services of her attorney James R. Hunsucker from February 15th, 1973 to date in the sum of $2,000.00 less credit of $500.00 previously awarded leaving a balance of $1500.00.

3. An award for the services of her attorney Frank R. Krenzky performed before February 15th, 1973 in the sum of $5,932.00 plus interest from February 15th, 1973 at the rate of 6% per annum.

4. An award for services of her attorney Frank R. Krenzky from February 15th, 1973 to date in the sum of $2,000.00 less credit of $500.00 previously awarded leaving a balance of $1,500.00.

5. An award for the services of her attorneys Blumer & Nally from February 20th, 1973 to date in the sum of $35,000.00 less credit of $1,500.00 previously awarded leaving a balance of $33,500.00.

6. An award for deposition costs of $266.60.

7. An award for expenses of brief printing of $319.14 less $100.00 previously awarded leaving a balance of $219.14.

8. An award for execution publication expenses of $528.98.

9. An award for appellate filing fee expenses in the sum of $60.00.

10. An award for expenses for a transcript, brief printing, and appeal costs in connection with the appeal of the Court's Order of February 13th, 1976 in the sum of $1,000.00.

11. An award for attorneys' fees for the services of her attorney James R. Hunsucker, Frank R. Krenzky and Blumer & Nally in connection with the appeal from the Court's Order of February 13th, 1976 in the sum of $5,000.00.

12. An award for the services of her attorneys Blumer & Nally, James R. Hunsucker and Frank R. Krenzky, necessitated by the prosecution of plaintiff's alternative motions for possession of the marital property, the appointment of a receiver and an accounting, which services are expected to be of the reasonable value of $5,000.00.

13. That the attorneys' fees, costs and expenses set out above are reasonable and necessary for the protection of plaintiff's claim; that plaintiff has no funds or income for which to pay said expenses; that defendant has money, assets, income and resources from which he can pay said expenses and equity and justice require that plaintiff be awarded the sums requested.

FILED MARCH 2, 1976

* * *

On April 5, 1976, the Court filed an Order Sustaining Petition to Set Aside Judgment in Case No. DR 75-4195.

This order is as follows:

"ORDER SUSTAINING PETITION TO SET ASIDE JUDGMENT

This Court, having considered all of the evidence to wit:

The Stipulation of the Parties filed with the Court, and, good cause appearing, it is hereby ordered that

this Court's judgment of February 15, 1973, in Case No. 749,413, Circuit Court of Jackson County, Missouri, is set aside in its entirety and held for naught.

It is so ordered.

Date: April 5, 1976."

FILED APRIL 5, 1976

Nos. KCD 28804, 28805, 28689

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

NADINE GODSY,
Appellant-Respondent,

vs.

SHERMAN M. GODSY, JR.,
Respondent-Appellant.

Appeal From the Circuit Court of Jackson County
Honorable Lewis W. Clymer, Judge

(Filed April 3, 1978)

Before Somerville, P.J., Turnage, J. and Mason, S.J.

The issues raised on these cross appeals necessitate a detailed recitation of the chronology of events and evidence which bring these antagonists, who were once fond enough of each other to get married and conceive one child, to this Court. The parties will sometimes be referred to in the roles they occupied in the trial court. Our review is as promulgated in Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976).

The parties were married on May 1, 1964, from which union a male child was born in 1966. On July 7, 1971, Nadine Godsy filed a petition for divorce alleging the necessary elements to obtain that relief under the statutes then in force. On July 14, 1972, Sherman M. Godsy, Jr., filed his First Amended Answer and Cross-Petition, with leave of court, likewise alleging the necessary elements which would entitle him to the divorce, if proven. In December, 1972, the parties and the trial judge agreed to a special setting on February 15, 1973, to try the case

on the merits. Six to eight continuances had previously been requested and granted. After obtaining the special setting the parties, through their attorneys, continued to negotiate a property settlement agreement, which negotiations were fruitless, mainly because defendant refused to sign an agreement which contained his previously accepted terms.

On January 23, 1973, defendant's then counsel wrote the docket clerk that it appeared the case would be resolved without trial and to remove the case from the trial docket for February 15th. On January 29, 1973, plaintiff's then counsel directed a letter to the trial judge, with a copy to the docket clerk, disputing the assertions of his opponent and requesting that the matter be retained on the trial docket. Under date of February 5, 1973, but not mailed until February 7th, and received by plaintiff's counsel on February 8th, defendant's attorney advised that he would not be able to try the case on February 15th as he and his family were leaving on February 10th for a ten day vacation to Hawaii and suggested the trial be postponed to the end of the month. Plaintiff's attorney responded by return mail, and personally, that he would not agree to a continuance and that he and his client would appear on trial date prepared for trial. He also verbally apprised the partner of defendant's counsel of his intentions. Defense counsel, or his partner, advised defendant that he need not appear for trial as the case was going to be continued.

Plaintiff and her counsel appeared as scheduled. Neither defendant nor his retained counsel appeared. An office associate of defendant's counsel appeared and orally moved for a continuance. Judge Clymer, after noting the many continuances and the special setting, denied the continuance and the case was heard as a non-contested matter. Judgement was entered granting plaintiff the divorce, custody of the minor child and alimony in gross of $100,000.00. In addition plaintiff received a judgment of $4,320.00 for attorney fees for her first attorney and $5,932.00 for her trial attorney. The alimony and child support judgment was based upon testimony heard by the Court that the parties owned real estate valued at $500,000.00 upon which they lived and operated three pay fishing lakes. The fishing lakes provided annual taxable income of some $45,000.00. In addition the parties owned personal property in excess of $100,000.00 value. The attorney fee awards were also supported by the necessary and competent evidence.

On February 28, 1973, defendant timely filed his motion for new trial, which was subsequently overruled. He thereafter filed his notice of appeal to this Court, but the appeal was dismissed as not being timely filed (reported at 521 S.W.2d 449). Thereafter, certiorari was denied by the United States Supreme Court at 423 U.S. 887, 96 S.Ct. 181, 46 L.Ed. 2d 119.

By this time both parties had changed legal counsel to their present attorneys. On August 5, 1975, defendant caused to be filed in the divorce case (No. 749,413) a pleading denominated as a Motion to Set Aside Judgment (hereafter "Motion"). The next day Mr. Godsy, as plaintiff, filed a pleading entitled Petition to Set Aside Judgment and for an Injunction (hereafter "Petition") (Case No. DR75-4195). The Motion and the Petition are almost identical in context and content. We will summarize, and at times paraphrase, the allegations contained in each pleading.

In the Motion defendant pleaded (1) the Motion was pursuant to Rules 74.32 and 74.78, in the nature of coram nobis, and that the judgment should be set aside for fraud; (2) the entry of default judgment on February 15, 1973;

(3) the filing of the Motion within three years; (4) that Rule 74.32 permits setting aside judgments within three years; (5) that the judgment was secured as a result of a misapplication of, and failure to follow, established rules of procedure; (6) that the clerk of the court had published a docket advising defendant's counsel that the case was on a motion to modify docket and that a motion for additional temporary alimony and child support was then pending, which plaintiff's counsel advised was going to be heard; (7) no notice of entry of order and judgment as provided by Rule 74.78; (8) that the judgment entry and transcript shows no notice was given to defendant or his counsel; (9) that the court exceeded its jurisdiction in entering default judgment with the motions for temporary monies and to strike defendant's pleadings being on file and not ruled; (10) defendant's due process rights under both the United States and Missouri Constitutions were violated by lack of adequate notice; (11) lack of competent and adequate evidence to permit entry of judgment and error in denying defendant's request for a continuance; (12) that evidence outside the record was available to support setting aside the default judgment; (13) that fraud was perpetrated upon defendant and his counsel by plaintiff's counsel agreeing to a continuance and that the case was settled and no hearing was necessary, and that only motions to modify would be heard; (14) that defendant was not represented at the hearing by his attorney in violation of the 6th and 14th Amendments of the United States Constitution and Article I, Section 10, and Article I, Section 14, of the Missouri Constitution; (15) that defendant was told by his counsel not to appear and was thereby free of personal fault and negligence; (16) defendant's counsel did not properly represent him which constituted a fraud in procurement of the judgment; (17) that the judgment was procured as the result of unavoidable accident or excusable

mistake of defendant who did not appear because of advice of counsel, which counsel was inattentive, inadequately prepared and gave bad advice; (18) defendant had no adequate remedy at law; and (19) that defendant had a meritorious defense based on the marital misconduct of plaintiff (which was definitively pleaded).

The Petition alleged the same grounds and, additionally, asserted that Mrs. Godsy had caused various attachments, levies and executions to issue against the real estate owned by the parties in order to collect the judgments rendered in her favor in the divorce case. In this case plaintiff (Mr. Godsy) prayed that the default judgment be set aside and that defendant (Mrs. Godsy) be enjoined from further judgment collection efforts. Defendant did not file an answer to this petition until March 27, 1976, after hearing, judgment and filing of notice of appeal. She appeared at the hearing on the Motion and Petition and offered evidence, without objection. In this posture the failure to file responsive pleadings is deemed waived. Gregg v. Johnston, 546 S.W.2d 754 (Mo.App. 1977).

The Motion and Petition were consolidated for hearing in the trial court, and the hearing was commenced on September 12, 1975, but not completed. The evidentiary hearing was completed January 19, 1976, and taken under advisement. On February 13, 1976, Judge Clymer entered his order sustaining the Motion to Set Aside Judgment (as filed in Case No. 749,413). It is from this order that Mrs. Godsy appeals in Case No. KCD-28689.

On April 5, 1976, the parties filed a stipulation that the trial court could consider all the evidence heard in both cases in ruling on the Petition to Set Aside Judgment, in ruling on the Motion for Attorney Fees Pendente Lite, filed on March 2, 1976, and the Motion for the Appointment of a Receiver, filed also on March 2, 1976. On April 5,

1976, an order was entered awarding attorney fees of $4,320.00, plus 6% interest from February 15, 1973, for services performed by plaintiff's first attorney; $5,932.00, plus 6% interest from February 15, 1973, for services performed by plaintiff's second attorney; and $4,000.00 for services performed by plaintiff's present attorney. On the same date the Court appointed a Receiver for the marital property and business, but that Receiver never qualified or served. It is from these orders that Mr. Godsy appeals in case No. KCD-28804. Also, on the same date the Court entered an order sustaining the Petition to Set Aside Judgment (as filed in Case No. DR75-4195). No injunctive relief was ordered. It is from this order that Mr. Godsy appeals in Case No. KCD-28805. No findings of facts and conclusions of law were requested or filed in support of the various judgments appealed from. These appeals have been consolidated. With this background and the delineation of the present status of the parties we will discuss the evidence presented at the hearing on the Motion and the Petition as is necessary to rule on the issues presented in these cross-appeals.

Evidence was adduced as to the pretrial activities of the respective counsel and the reason why defendant and his counsel did not appear for the scheduled hearing, as above enunciated. Mr. Godsy testified as to the premarriage acquisition of a portion of the real estate and the post-marriage acquisition of the remainder and the conveying of title to all of the real estate to him and his wife as tenants by the entirety. No evidence was presented to overcome the presumption of gift. He opined the value of the real estate and improvements to be no more than $115,000.00 and offered an expert witness who testified to the same effect. He also denied that the fishing lakes, and his hauling of fish during the winter months, produced annual taxable income as testified to

by Mrs. Godsy in the divorce proceeding. Taxable income declared on the 1971, 1972 and 1973 individual returns filed by Mr. Godsy supports his testimony. He also testified that the allegations pleaded that his wife was not the innocent and injured party were true. Nadine Godsy, called as a witness by Sherman Godsy, reiterated her opinions as to property values and income in conformance with her testimony at the divorce hearing. She also offered a witness who testified that in September, 1973, he had several corporate clients, each of whom were willing to pay the Godsys $600,000.00 for the real estate (70 plus acres), and communicated that to Mrs. Godsy and the attorneys for the respective parties. The parties also stipulated that the reasonable charges for legal services performed by Mr. Blumer in representing Mrs. Godsy on the earlier appeal and in the United States Supreme Court was $2,625.00 plus an expense of $230.00 for the printing of the briefs. The testimony also developed that Mrs. Godsy was unemployed and without funds. This is a summarization of the lengthy evidentiary hearing, but fairly and adequately condenses the evidence adduced, and is the essence of that evidence.

We will first consider the ruling of the trial court on the Motion, excluding from that consideration for the present time those allegations which seek to invoke equity jurisdiction. It must be remembered that the Motion was filed on August 5, 1975, almost two and a half years after the entry of judgment and almost two years after the judgment became final. With certain exceptions, which we will hereafter discuss, a final judgment is beyond the reach of the trial court to alter or vacate, Rule 81.05, V.A.M.R.; Hughes v. St. Louis National League Baseball Club, Inc., 359 Mo. 993, 224 S.W.2d 989 (Mo. banc 1949); Highland Gardens Nursery, Inc. v. North American Developers, Inc., 494 S.W.2d 321 (Mo. 1973); Perryman v. Perry-

man, 507 S.W.2d 671 (Mo. App. 1974). The allegations in the Motion that might be perceived as asserting a meritorious defense or excusable neglect, which factors are considered in that class of cases exemplified by Stieferman v. Stieferman, 219 S.W.2d 864 (Mo. App. 1949); Hinson v. Hinson, 518 S.W.2d 330 (Mo.App. 1975); and Krieber v. Krieber, 420 S.W.2d 376 (Mo.App. 1967), are not pertinent or controlling here because, as stated, the judgment of February 15, 1973, was a final judgment when the Motion was filed in August, 1975, and the trial court was without jurisdiction to alter or vacate that judgment, Wiseman v. Lehmann, 464 S.W.2d 539 (Mo.App. 1971); Bradley v. Bradley, 295 S.W.2d 592 (Mo.App. 1956); Godsy v. Godsy, supra.

Further consideration requires that we note that the Motion may be treated "as a proceeding in equity constituting an attack upon a divorce decree which the court below had equity jurisdiction to consider," S..... v. S....., 490 S.W.2d 344 (Mo.App. 1973). We will, therefore, consider both the Motion and Petition in the context of invoking equity jurisdiction. We will view both pleadings from the five directions urged by the respondent, Sherman Godsy, who relies heavily on the case of Diekmann v. Associates Discount Corporation, 410 S.W.2d 695 (Mo. App. 1966). In that case it is stated, "[O]ur procedural arsenal holds six weapons designed to bring down a final default judgment: [1] a separate suit in equity, [2] a statutory petition for review, [3] a nunc pro tunc order, [4] a motion in the nature of a writ of error coram nobis, [5] a motion showing fraud practiced on the court, and [6] a motion showing irregularity on the face of the record," supra, at page 700. Respondent concedes a nunc pro tunc order was not the relief requested. We will identify these "weapons" as we discuss them.

Number six is within the scope of Rule 74.32, Missouri Rules of Civil Procedure. Mr. Godsy's conception of the breadth of that rule is erroneous. That rule permits a judgment to be set aside for irregularity on the face of the record, but does not permit the introduction of extraneous evidence to invalidate an otherwise valid judgment, Dewey v. Dewey, 544 S.W.2d 857 (Mo.App. 1976); Whitlock v. Whitlock, 395 S.W.2d 468 (Mo.App. 1965). There is absolutely no showing that the judgment of February 15, 1973, was irregular on its face. Therefore, the setting aside of that final judgment cannot be sustained on that ground.

Respondent, Sherman Godsy, also asserts that both pleadings are in the nature of a motion of writ of error coram nobis (number four above). This type of proceeding is predicated upon errors of fact, which facts if correctly known would have prevented the rendition of the judgment, Zahorsky v. Zahorsky, 543 S.W.2d 258 (Mo. App. 1976). A motion for writ of error coram nobis is not intended to authorize any court to review or revise its decrees, Pike v. Pike, 239 Mo. App. 655, 193 S.W.2d 637 (Mo.App. 1946). All of the evidence adduced only tends to prove that the trial court *may* have rendered a different judgment had both parties testified during the divorce proceedings. There is absolutely no showing that Mr. Godsy acquired knowledge of facts, after February 15, 1973, that would have *prevented* the rendition of some judgment on that date. Under the facts here pleaded and adduced, that remedy is not available, Dewey v. Dewey, supra, and the reversal of the judgment cannot be sustained on that ground.

In both pleadings Mr. Godsy asserts the filing of those pleadings within three years and also asserts that Rule 74.32 permits the setting aside of judgments within that

time span. We have already discussed, and ruled, the scope of that rule. We conceive this allegation to be in the nature of a Petition for Review (number two above). Although not brought to our attention by the parties, or to the attention of the trial court, Section 452.110, RSMo., not repealed by the enactment of the Dissolution of Marriage Act, Laws of 1973, Sections 452.300 to 452.415, inclusive, provides, in part, "[N]o petition for review of any judgment for divorce, rendered in any case arising under this chapter, shall be allowed, any law or statute to the contrary notwithstanding." This statute has long been in effect in this State and is fixed public policy, Bernstein v. Bernstein, 351 S.W.2d 46 (Mo.App. 1961). Therefore, that "weapon" is not available in this case, Whitlock v. Whitlock, supra, and the reversal of the judgment cannot be sustained on that ground. There is an additional reason why a petition for review would not be permissible in this case, that being that Mr. Godsy was not in default within the meaning of Rule 74.045 and 74.12 V.A.M.R., he having been duly summoned and filing an answer.

In a proceeding in equity (number one above) and petitioner must plead and prove that the decree was procured by fraud (number five above) and that fraud must relate not to the propriety of the judgment itself but to the manner in which the judgment was obtained, Bernstein v. Bernstein, supra; Reis v. LaPresto, 324 S.W.2d 648 (Mo. 1959); McCarty v. McCarty, 300 S.W.2d 394 (Mo. 1957); Hamphill v. Quigg, 355 S.W.2d 57 (Mo. 1962); Hemphill v. Hemphill, 316 S.W.2d 582 (Mo. 1958); F. v. F., 333 S.W.2d 320 (Mo.App. 1960); Jones v. Jones, 254 S.W.2d 260 (Mo.App. 1953); and Cherry v. Wertheim, 25 S.W.2d 118 (Mo.App. 1930), relied on by respondent in his brief.

All of these cases expound the same general principles as enunciated in the often cited case of Jones v. Jones,

supra, at page 261, as follows: "It is well established that equity has jurisdiction to grant relief against a judgment upon the ground of fraud in its procurement so long as the complaining party is able to show that he himself was free from fault, neglect or inattention to his case. But for the fraud to have existed in the procurement of the judgment, it must have related, not to the propriety of the judgment itself, but to the manner in which the judgment was obtained. In other words, the fraud must have been extrinsic or collateral to the matters which either were or could have been presented and adjudicated in the original proceeding, and not merely intrinsic in the sense of having pertained to the merits of the cause upon which the judgment of the court was rendered. In short, it is not the province of this feature of equitable jurisdiction to afford the losing party a retrial of matters either tried or concluded by the original proceeding, but instead relief is limited to those instances where the fraud was of such a character as to have forestalled an opportunity for the fair submission of the controversy. Of such is the situation where the losing party to an action had a meritorious defense to interpose, but was prevented, without fault on his own part, from setting up his defense by reason of the fraud, deceit or artifice of the successful party. In such an instance the fraud is to be regarded as having been perpetrated, not only upon the losing party, but upon the court as well, and if and when established constitutes a proper ground for equitable relief against the judgment."

As can be plainly discerned from the evidence which we have already delineated, there was no showing that the judgment was procured by fraud. The evidence adduced was, at best, only conflicting for resolution by the trier of the facts. Mr. Godsy's evidence as to property

values and income could have been presented at the trial of the divorce case had he appeared. The same is true as to his pleaded charges of marital misconduct. The disparate property values and amounts of income as testified to by the witnesses is not proof of fraud and is not the kind of testimony that would justify vitiating the judgment, Hupp v. Murphy Finance Co., 502 S.W.2d 345 (Mo. 1973). That testimony is extrinsic or collateral to the matters adjudicated and goes to the propriety of the judgment, not to the manner in which the judgment was obtained. Jones v. Jones, supra; Reis v. LaPresto, supra.

The reasons advanced for defendant and his counsel failing to appear at the scheduled trial setting likewise do not give rise to fraud in the procurement of the judgment. To reach that status the failure to appear must be as a direct result of the deceit and deception practiced by the prevailing party. Jones v. Jones, supra; J. R. Watkins Company v. Hubbard, 343 S.W.2d 189 (Mo.App. 1961); Bogdon v. Commerce Bank of Kansas City, 537 S.W.2d 650 (Mo.App. 1976); Reis v. LaPresto, supra. This evidence could not support the conclusion that defense counsel was deceived by his opponent. Evidence to the contrary has already been enunciated. In addition, there are transcript statements of plaintiff's counsel that he would have acceded to a request for a continuance by any other counsel, leading to the inescapable conclusion that both counsel were acting in the role of professional antagonists enhanced by personal animosity, and were not acting in concert. Prior to defense counsel's departure, his opponent verbally and in writing expressed his intention to seek an adjudication of the divorce action on the scheduled date. Defense counsel could not have been misled in any way so as to justify the setting aside of the judgment on the grounds of fraudulent procurement. Head

v. Ken Bender Buick Pontiac, Inc., 452 S.W.2d 596 (Mo. App. 1970); Falcon Enterprises, Inc. v. Precise Forms, Inc., 509 S.W.2d 170 (Mo.App. 1974). This same evidence is inapposite to proof that defendant was "free from fault, neglect, or inattention to his case" which is a foundation requirement for setting aside the judgment. Jones v. Jones, supra.

Both pleadings also attacked the judgment on the ground that Mr. Godsy was not given notice of the entry of judgment in accordance with Rule 74.78. That rule provides that the "judgment shall be set aside for good cause shown upon motion filed within six months from the entry of the order of judgment" should the clerk of the court fail to give notice of the entry of judgment to defendants who are not in default for failure to appear. Mr. Godsy cannot be granted relief by that rule as he failed to file a motion to set aside the judgment within six months. Further, no prejudice can be demonstrated by lack of such notice as Mr. Godsy had actual knowledge of the entry of judgment as he timely filed a Motion for New Trial. Had he chosen to do so, he could have filed his Motion at the same time. (It being unnecessary to do so, we specifically do not decide if Mr. Godsy was entitled to the notice required by that rule.)

As has been demonstrated, the trial court erred in sustaining the Motion and the Petition. The judgments appealed from in KCD-28689 and KCD-28805 are reversed and remanded with directions to dismiss with prejudice the Motion filed on August 5, 1975, in Circuit Court Case No. 749,413 and to reinstate the judgment of February 15, 1973, and also to dismiss with prejudice the Petition filed in Circuit Court Case No. DR75-4195. That portion of the judgment for attorney fees in the amount of $4,320.00, plus 6% interest from February 15, 1973, and

$5,932.00, plus 6% interest from February 15, 1973, awarded to Mrs. Godsy in the judgment of April 5, 1976 (KCD-28804), being duplicative of the judgment of February 15, 1973, is reversed. That portion of the judgment of April 5, 1976, appointing a Receiver to take charge of the real estate and property owned by the parties is reversed as being moot, the Receiver not having qualified or acted, and also as not being supported by the evidence, Murphy v. Carron, supra.

The attorney fee award in favor of Mrs. Godsy dated April 5, 1975, in the amount of $4,000.00 for services performed by her present counsel likewise is not supported by the evidence, Murphy v. Carron, supra. This being a proceeding in equity, we review the case upon both the law and the evidence and reach our own independent conclusions as to the proper judgment to be entered, Murray v. Murray, 538 S.W.2d 587 (Mo.App. 1976); In Re Marriage of Powers, 527 S.W.2d 949 (Mo.App. 1975). That judgment is reversed and remanded with directions to enter judgment in favor of Mrs. Godsy in the amount of $2,855.00 as of April 5, 1976.

We have studied the briefs and the transcript and are cognizant of and have considered each of the remaining points asserted by the parties. An explication of those points would not alter the disposition we have reached, nor be of precedential value. Rule 84.16(b).

Accordingly, the judgments appealed from are reversed and the cause remanded for the entry of judgments as directed.

All concur.

Donald L. Mason, Special Judge

APPENDIX B

Supreme Court No. 60777

Court of Appeals Nos. 28,869
28,804
28,805

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

TRANSFER

Nadine Godsy,
Appellant-Respondent,

vs.

Sherman M. Godsy, Jr.,
Respondent-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed September 8, 1978)

Notice is given that Appellant appeals from the judgment entered in this action on the 3rd day of April, 1978, from the Order of the Missouri Court of Appeals, Kansas City District, on May 1, 1978, overruling Appellant's Motion for Rehearing and Transfer, and the Order of this Court denying Appellant's Application to Transfer on June 15, 1978, all in accordance with Rule 10, Rules of the Supreme Court of the United States.

The party taking the Appeal is Respondent-Appellant, Sherman M. Godsy, Jr. All of the judgment entered in this cause on April 3, 1978, as well as the subsequent

Orders overruling Motions for Rehearing and Transfer, are appealed from. Appellant takes that Appeal pursuant to 28 USC 1257(2) and 28 USC 2101(c).

Koenigsdorf, Kusnetzky & Wyrsch
By: /s/ James R. Wyrsch
1050 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
Phone: (816) 221-0080
Attorney for Respondent-Appellant

Dated this 8th day of September, 1978.

Copy of the above and foregoing Notice of Appeal delivered on this 8th day of September, 1978, to: THAINE Q. BLUMER, 2010 Traders Bank Building, 1125 Grand, Kansas City, Missouri, Attorney for Appellant-Respondent, Nadine Godsy.

/s/ James R. Wyrsch
Attorney for Respondent-Appellant,
Sherman M. Godsy, Jr.

Supreme Court No. 60777

Court of Appeals Nos. 28,869
28,804
28,805

IN THE SUPREME COURT OF MISSOURI

TRANSFER

Nadine Godsy,
Appellant-Respondent,
vs.
Sherman M. Godsy, Jr.,
Respondent-Appellant.

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES

Notice is given that Appellant appeals from the judgment entered in this action on the 3rd day of April, 1978, from the Order of the Missouri Court of Appeals, Kansas City District, on May 1, 1978, overruling Appellant's Motion for Rehearing and Transfer, and the Order of this Court denying Appellant's Application to Transfer on June 15, 1978, all in accordance with Rule 10, Rules of the Supreme Court of the United States.

The party taking the Appeal is Respondent-Appellant, Sherman M. Godsy, Jr. All of the judgment entered in this cause on April 3, 1978, as well as the subsequent Orders overruling Motions for Rehearing and Transfer,

are appealed from. Appellant takes that Appeal pursuant to 28 USC 1257(2) and 28 USC 2101(c).

Koenigsdorf, Kusnetzky & Wyrsch
By: /s/ James R. Wyrsch
1050 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
Phone: 221-0080
Attorney for Respondent-Appellant

Dated this 8th day of September, 1978.

Copy of the above and foregoing Notice of Appeal delivered on this 8th day of September, 1978, to: THAINE Q. BLUMER, 2010 Traders National Bank Building, Kansas City, Missouri, Attorney for Appellant-Respondent, Nadine Godsy.

/s/ James R. Wyrsch
Attorney for Respondent-Appellant,
Sherman M. Godsy, Jr.

APPENDIX C

Nos. KCD 28804
28805
28689

IN THE MISSOURI COURT OF APPEALS

KANSAS CITY DISTRICT

NADINE GODSY,
Appellant-Respondent,

vs.

SHERMAN M. GODSY, JR.,
Respondent-Appellant.

MOTION FOR REHEARING AND/OR TRANSFER

(Filed April 17, 1978)

COMES NOW Sherman Godsy and respectfully moves the Court to set aside its decision and opinion herein and grant a rehearing of this cause, or, alternatively, to transfer this cause to the Supreme Court on the following grounds:

1. The opinion of the Court ignores the importance of the official printed Court Docket sent to Sherman Godsy's attorney showing the case on a "motion docket" and the letter from Nadine Godsy's attorney referring to the hearing of "Motions" on February 13, 1973.

2. The opinion of the Court misstates the law in stating that fraud that will justify setting aside the judgment must be perpetrated by the opposing party and ignores the holding in *Hemphill* v. *Hemphill,* 316 S.W.2d 582 (Mo. 1958).

3. This cause should be transferred to the Supreme Court for re-examination of the question of whether the attorney's neglect should be so rigidly imputed to the client.

4. The opinion ignores the holding of *Murphy* v. *Carron*, 536 S.W.2d 30 (Banc 1976) in that it substitutes the judgment of this Court for that of the trial court by holding that the confusion regarding what was docketed on February 13, 1978 was not an excusable mistake justifying the setting aside of a judgment by a court of equity.

WHEREFORE, Sherman Godsy prays this Court to order a rehearing of this cause, or, alternatively, to transfer this cause to the Supreme Court.

Respectfully submitted,

Koenigsdorf, Kusnetzky & Wyrsch
By /s/ James R. Wyrsch
and
By /s/ Ronald R. Holliger
1050 Home Savings Bldg.
1006 Grand Avenue
Kansas City, Missouri 64106
Telephone: (816) 221-0080
Attorneys for Respondent-Appellant

The undersigned hereby certifies that a copy of the above and foregoing was hand-delivered this 17th day of April, 1978, to: THAINE Q. BLUMER, 1801 Traders Bank Bldg., 1125 Grand Ave., Kansas City, Mo. 64106, Attorney for Appellant-Respondent.

/s/ Ronald R. Holliger

IN THE SUPREME COURT OF MISSOURI

Nos. KCD 28804
28805
28689

NADINE GODSY,
Appellant-Respondent,

vs.

SHERMAN M. GODSY, JR.,
Respondent-Appellant.

APPLICATION FOR TRANSFER TO THE SUPREME COURT OF MISSOURI

TO THE HONORABLE JUDGES OF THE SUPREME COURT OF MISSOURI:

1. Your Petitioner respectfully submits its application for a transfer to review and quash the judgment of the Missouri Court of Appeals, Kansas City District, in a certain cause styled Nadine Godsy, Appellant-Respondent, vs. Sherman M. Godsy, Jr., Respondent-Appellant, Nos. KCD 28,804, 28,805 and 28,689, wherein said Court of Appeals reversed a judgment for the Petitioner herein and remanded the cause to the Circuit Court of Jackson County for entry of judgment in favor of Nadine Godsy, in an opinion by the Honorable Donald L. Mason, Special Judge. Timely motions by the Petitioner for a rehearing and for an order of transfer were overruled by the Missouri Court of Appeals, Kansas City District, on the 1st day of May, 1978.

2. Attached hereto are the opinion of the Missouri Court of Appeals, Kansas City District, "Exhibit 1"; your Petitioner's Motion for Rehearing and for Transfer, "Exhibit 2"; and the order of the Missouri Court of Appeals, Kansas City District, overruling said motions for rehearing

and for transfer, "Exhibit 3". Presented herewith are also suggestions in support of this application, and Petitioner's Notice of Application to opposing counsel and to the Clerk of the Court of Appeals.

3. The cause in question was an action instituted in the Circuit Court of Jackson County by two separate proceedings, subsequently consolidated, filed by your Petitioner herein. On February 15, 1973 a default judgment of divorce was entered for Nadine Godsy against your Petitioner in Division 8 of the Jackson County Circuit Court. Your Petitioner's then counsel subsequently appealed that judgment, but the appeal was dismissed because untimely filed. *Godsy* v. *Godsy*, 521 S.W.2d 449 (Mo.App., 1975). On August 5, 1975, your Petitioner filed a Motion to Set Aside Judgment in the original divorce proceeding, and on the following day, August 6, 1975, filed in a separate independent equity proceeding a Petition to Set Aside Judgment.

4. On February 13, 1976, the Court entered its order sustaining the Motion to Set Aside Judgment filed in the original divorce action, and on April 5, 1976 filed its order sustaining the Petition to Set Aside Judgment in the separate equity proceeding. From those judgments, Nadine Godsy appealed to the Missouri Court of Appeals, Kansas City District. After entry of the order of February 13, 1976, Nadine Godsy filed a "Motion for Attorney's Fees Pendente Lite" and a motion to appoint a receiver of the jointly held property. Subsequently an order granting the attorney's fees and appointing a receiver was entered, from which orders Sherman Godsy, your Petitioner, appealed. All appeals were consolidated in the Missouri Court of Appeals, Kansas City District.

5. The opinion of the Court of Appeals misstates the law in stating that fraud that will justify setting aside

a default judgment just be perpetrated by the opposing party, and alternatively, in so holding is in direct conflict with the decision of this Court in *Hemphill* v. *Hemphill*, 316 S.W.2d 582 (Mo. 1958). The default judgment attacked by your Petitioner's actions on appeal herein was rendered on February 15, 1973. Your Petitioner's then counsel had advised your Petitioner that the matter was or would be continued and that it was not necessary for him to appear that date. Your Petitioner's then counsel left the country at that time and did not appear at the hearing at which the default judgment was entered. The opinion of the court (at p. 13) states that to constitute fraud in the procurement of a judgment "the failure to appear must be as a direct result of the deceit and deception practiced by the prevailing party." Your Petitioner submits that that statement of the law is a misstatement of the law of this State, and alternatively, directly conflicts with the holding of the Supreme Court in *Hemphill, supra.* Therein no contention was made that fraud had been perpetrated by the prevailing party, but rather the fraud was perpetrated *upon the court* by the personal representative of the defaulting party. Your Petitioner submits that the evidence in this cause, as impliedly believed by the trial court herein, clearly showed the type of fraud described in *Hemphill, supra,* and that the opinion of the Missouri Court of Appeals is therefore in conflict with that holding.

6. This cause should be transferred to the Supreme Court for a re-examination of the existing law concerning imputation of an attorney's neglect to his client. The evidence was clear and undisputed that your Petitioner himself was totally free of personal fault or neglect in failing to appear for the hearing. Likewise, the evidence was clear that your Petitioner's then counsel failed to appear, either from his own personal fault or neglect, or by confusion concerning the nature of the hearing and

proceedings scheduled on February 15, 1973. The long-standing rule that the neglect of the attorney is to be imputed to the client is an abomination in modern society. It is a principle which ignores current social trends, and more importantly, demands and expectations of the public from the legal community. This Court should consider whether or not the remedy that a client might theoretically have against his attorney is the only satisfactory remedy for such neglect.

7. The opinion of the Missouri Court of Appeals ignores the holding of *Murphy* v. *Carron,* 536 S.W.2d 30 (banc, 1976), in that it substitutes the judgment of that court for that of the trial court by holding that the confusion existing as to what was docketed for hearing in the trial court on February 15, 1973 was not an excusable mistake that would constitute grounds for the setting aside of a judgment by a court of equity.

WHEREFORE, Petitioner prays this Court to issue its Order of Transfer, directing the Missouri Court of Appeals, Kansas City District, to certify to this Court the record in such mentioned cause, and upon consideration thereof, to quash said judgment of the said Court of Appeals and give such other and further relief as in the premises may appear to be proper.

Koenigsdorf, Kusnetzky & Wyrsch
By /s/ James R. Wyrsch
and
By /s/ Ronald R. Holliger
1050 Home Savings Bldg.
1006 Grand Avenue
Kansas City, Missouri 64106
Telephone: (816) 221-0080
Attorneys for Sherman M. Godsy,
Respondent-Appellant

IMPORTANT NOTICE

MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

DATE: May 1, 1978

IN RE: Nadine Godsy vs. Sherman M. Godsy, Jr.

KCD# 28689-804-805

Appellant

Respondent Motion for rehearing overruled. Transfer to Supreme Court denied. See Rule 83.03

cc: Thaine Q. Blumer, James Wyrsch

Mary Louise Thomas, Clerk

NO. 60777

IN THE SUPREME COURT OF MISSOURI

KANSAS CITY DISTRICT NOS. 28804, 28805, & 28689

May Session 1978

TRANSFER

Nadine Godsy,
Respondent,

vs.

Sherman M. Godsy, Jr.,
Appellant.

Now at this day, on consideration of appellant's Application to transfer the above entitled cause from the Kansas City District Court of Appeals, it is ordered that said application, be and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1978, and on the 15th day of June 1978, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 15th day of June 1978.

/s/ Thomas F. Simon Clerk.

/s/ By Janice B. Hanson D. C.

Supreme Court, U. S.
FILED
OCT 19 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-431

NADINE GODSY,
Appellee,
vs.
SHERMAN M. GODSY, JR.,
Appellant.

APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

MOTION OF APPELLEE NADINE GODSY TO DISMISS

HOMER C. BITTIKER
THAINE Q. BLUMER
DEAN A. HODAPP
1801 Traders National Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106
Telephone: (816) 471-4881
Attorneys for Appellee

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-431

NADINE GODSY,
Appellee,

vs.

SHERMAN M. GODSY, JR.,
Appellant.

APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

MOTION OF APPELLEE NADINE GODSY TO DISMISS

Appellee Nadine Godsy, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal in the above entitled case on the grounds (a) that the appeal does not present a substantial federal question, (b) that the federal question sought to be raised was not timely or properly raised or expressly passed on by the court below, and (c) the judgment by the court below rests on an adequate non-federal basis.

STATEMENT OF CASE

This case is a divorce action initiated by the appellee in the Circuit Court of Jackson County, Missouri, on July 7, 1971. After nearly one and one-half years of postponement, the case was set for a special hearing on February 15, 1973, at the request of appellant's trial counsel and with the consent of appellee's counsel. The docket notices mailed to both parties by the Circuit Clerk's office mistakenly listed the case under "Motions to Modify"; nonetheless, both counsel for appellant and appellee understood that the hearing was to be a trial on the divorce itself, as set out in the affidavit of appellant's trial counsel filed with the court on February 23, 1973 (Appendix A). The trial record reveals that the appellant's trial counsel had been advised *by the court* that the case would be specially set on February 15, 1973 (Appendix B). On the day of the hearing, appellant's counsel was out of town on vacation and had an office associate appear for him to request a continuance. The continuance was denied and the trial court advised the associate counsel as follows: "You can tell the others what we are going to do. The court will deny the request. I am going to hear it in the absence of the defendant. I don't believe he wants to have it heard. He isn't in good faith at all here. . ." (Appendix B). Thereafter, a hearing on the divorce was held and appellee was granted a divorce, judgment for $110,352.00 in alimony, attorney fees, and suit money, along with child support of $150.00 per week and custody of the minor child (Appendix C).

Appellant timely filed a Motion for New Trial which was overruled on March 16, 1973, by the trial court and appellant thereafter filed an untimely Notice of Appeal to the Missouri Court of Appeals, Kansas City District, but the appeal was dismissed as not being timely filed

(reported at 521 S.W.2d 449). Thereafter, certiorari was denied by the United States Supreme Court at 423 U.S. 887, 96 S.Ct. 181, 46 L.Ed.2d 119 (1975).

On August 5, 1975, appellant filed a Motion to Set Aside Judgment (Appendix D) and the following day appellant, as plaintiff, filed a pleading entitled Petition to Set Aside Judgment and For An Injunction (Appendix E). The Motion and Petition were consolidated for hearing in the trial court, an evidentiary hearing took place and an order was entered sustaining the Motion to Set Aside Judgment (Jurisdictional Statement, Appendix A, p. A1). Thereafter, Respondent filed a timely Notice of Appeal.

On April 5, 1976, the trial court entered an Order Sustaining the Petition to Set Aside Judgment (Jurisdictional Statement, Appendix A, pp. A3-A4) and Respondent thereafter filed a timely Notice of Appeal. The appeals from the Motion and Petition were consolidated, both sides briefed and argued the issues before the Missouri Court of Appeals, Kansas City District and a decision was filed on April 3, 1978 (Jurisdictional Statement, Appendix A, pp. A5-A18).

The Court of Appeals held that the trial court erred in setting aside the default judgment and ordered the judgment reinstated (Jurisdictional Statement, Appendix A, p. A17). Appellant now complains that he was denied due process of law by the trial court entering a default judgment against him without notice, without opportunity to be heard and without the opportunity to be present and to be represented by counsel. Motion for Rehearing and/or Transfer to the Supreme Court of Missouri was made and denied (Jurisdictional Statement, Appendix C, p. A23). Thereafter, appellant's Application for Transfer to the Supreme Court of Missouri was denied on May 1, 1978 (Jurisdictional Statement, Appendix C, p. A29).

ARGUMENT

There Is No Substantial Federal Question Presented

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257 (2), by appeal from the state court, or alternatively, under 28 U.S.C. §1257 (3), by writ of certiorari. In either case the "appeal" must present a substantial federal question, *Cross* v. *Bruning*, 413 F.2d 678 (9th Cir. 1969); 28 U.S.C. §1257 (2) and (3). None is presented here. Briefly stated, the issue raised by appellant is:

> Whether the Circuit Court denied appellant due process by entering a default judgment without sufficient notice and opportunity to be heard.

Appellee does not dispute the factual allegations as presented to this Court by the appellant regarding notice and opportunity to be heard at the trial court. Appellant seeks to claim lack of notice and opportunity to be heard at the divorce trial on the basis of the docket notice which listed this matter for hearing on "Motions to Modify", despite the affidavit of trial counsel for the appellant that acknowledges proper notice of *trial*. Appellant had sufficient notice and opportunity to be heard, but, by and through his counsel, simply failed to take advantage of that opportunity.

None of the cases cited by appellant regarding due process compare even remotely to the facts and circumstances presented here. Appellee concurs with the broad statements quoted by appellant in his Jurisdictional Statement regarding the v[illegible]ue of, and necessity for, notice and opportunity to be heard. In this case however, it was not the lack of procedural safeguards that plagued this appellant; rather it was his own misuse and neglect in

adhering to those procedural safeguards that brings appellant to this Court. Further, the question raised was conclusively settled by this Court in *Godsy* v. *Godsy* (Statement of Case, *supra*, pp. 2-3) wherein certiorari was denied the appellant on the same due process issue now before this Court. In any event, the question so raised by appellant fails to present a substantial federal question.

As will be later discussed, the question which appellant now seeks to raise was not properly raised or passed on by the courts below and the judgment of the courts below rests on an adequate non-federal basis.

I. The Trial Court's Entry of a Default Judgment Against Appellant Did Not Violate the Rights of Appellant Under the Fourteenth Amendment to the United States Constitution in That Appellant Was Not Denied Notice and the Opportunity to Be Heard.

Appellant contends that a substantial federal question was presented because the trial court entered a default judgment without appellant-defendant, or his counsel, being present, and further, that trial counsel was not given notice of the hearing of February 15, 1973. The Court's attention is respectfully directed to the affidavit of trial counsel (Appendix A) wherein he acknowledges notice of a "trial date" on February 15, 1973. In reality, if it were not for a clerical error in listing the case under "Motions to Modify", appellant would be without any excuse whatsoever with respect to notice. Appellant's trial counsel was fully aware of the trial date, and the *true nature* of the proceeding, and the listing error has simply provided appellant with an after-the-fact opportunity to try and salvage what he can. The trial court did not buy this line of argument and a default judgment was properly entered.

Appellant, even though there is no mention of the constitutionality of any state statute or rule in his Jurisdictional Statement, apparently appeals this issue under the auspices of Rule 61.01 of the Missouri Rules of Civil Procedure which authorize the trial court as in this case to strike a party's pleadings and enter a default judgment if that party fails to properly proceed with discovery (Appendix F, pp. 37-39). Appellant alleges no deficiency of Rule 61.01 nor does appellant even bring into issue any statute or rule of the State of Missouri. Assuming *arguendo* that appellant is challenging the constitutionality of Rule 61.01 of the Missouri Rules of Civil Procedure as the complained of action on the part of the trial judge was taken pursuant to this rule, it is obvious after an examination of Rule 61.01 (Appendix F) that the rule exists to provide the trial judge with the authority to take action against a party that, after having ample notice, chooses not to avail himself of his day in court or his opportunity to be heard. A reading of the trial transcript, and particularly the pre-trial conference in chambers with the Honorable Circuit Judge Lewis Clymer, puts the situation in its proper perspective (Appendix B).

Petitioner-appellee had been prejudiced by numerous continuances and delays at least some of which were at the insistence of appellant. Judge Clymer, being aware of these facts, properly exercised his discretion by denying the continuance sought by appellant on the trial date. Rule 65.01 of the Missouri Rules of Civil Procedure (Appendix G) governing continuances provides that the court *may* continue an action until a later date for good cause shown, but the request *must be in writing and by affidavit* unless the adverse party consents (Appendix H). In the instant case, there was no written request, no affidavit and no consent (Appendix B, p. 15). The Missouri Courts have consistently held that "acts of the trial judge

in controlling his docket and the progress of litigation and in the granting or denying of continuances are discretionary." *State ex rel. Schaper* v. *Stassie,* 487 S.W.2d 49 (1972); *Searles* v. *Searles,* 495 S.W.2d 759 (1973); *Krieber* v. *Krieber,* 420 S.W.2d 326 (1967). The fact of the absence of defendant's counsel at the time of trial, in and of itself, does not compel a continuance. *Clinton* v. *Clinton,* 444 S.W.2d 677 (1969); *Carr* v. *Carr,* 308 S.W.2d 357 (1957).

Accordingly, appellee respectfully submits that appellant's allegation presents no substantial federal question at all, as there was, in fact, both notice and an opportunity for him to be heard.

The Questions of Due Process Violations Were Not Properly Raised or Decided by the Courts Below

In his Jurisdictional Statement, appellant attempts to invoke this Court's jurisdiction by alleging a violation of due process by the trial court in entering a default judgment against him without notice, without an opportunity to be heard and without the opportunity to be present and represented by counsel. 28 U.S.C. §1257 (2) provides for appeal jurisdiction to exist from the final judgment of the highest state court

> where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellant raises at no place in his Jurisdictional Statement the constitutionality of any Missouri statute or rule nor does he raise any question of constitutionality whatsoever in his Motion for Rehearing and/or Transfer (Jurisdictional Statement, Appendix C, p. A23) or his Application for Transfer to the Supreme Court of Missouri (Jurisdic-

tional Statement, Appendix C, p. A25). At best, appellant appears, rather, to be challenging the validity of state action, namely the action on the part of the trial court in entering a default judgment, under the auspices of a statute or rule without actually bringing the validiity or constitutionality of any Missouri statute or rule into question. *Zucht* v. *King,* 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922); *Jett Brothers Distilling Co.* v. *City of Carrollton,* 252 U.S. 1, 40 S.Ct. 255, 64 L.Ed. 421 (1920); *Rohr Aircraft Corp.* v. *County of San Diego,* 362 U.S. 628, 80 S.Ct. 1050, 4 L.Ed.2d 1002 (1960). Because of appellant's failure to properly frame the issue in his Jurisdictional Statement, appeal jurisdiction must fail. As stated by this Court in *Memphis Natural Gas Co.* v. *Beeler,* 315 U.S. 649, 650, 62 S.Ct. 857, 859, 86 L.Ed. 1090 (1942):

> It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal.

As stated above, Rule 61.01 of the Missouri Rules of Civil Procedure, under the aegis of which the challenged action by the trial court took place, is not mentioned, cited, discussed or even alluded to anywhere in the Motion for Rehearing and/or Transfer or the Application for Transfer to the Supreme Court of Missouri. Appellee respectfully suggests that it would be extraordinarily difficult for this Court to accept this appeal in light of the restraints placed on its jurisdiction by 28 U.S.C. §1257.

In *Cardinale* v. *Louisiana,* 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969), Justice White's opinion for this Court aptly stated both the law and the reasoning that it is suggested should apply to the present case:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell* v. *Randell,* 10 Pet. 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with *Owings* v. *Norwood's Lessee,* 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, Sec. 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion [citations], and since . . . [citations omitted].
>
> [T]here are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor* v. *Ohio,* 385 U.S. 92, 87 S.Ct. 252, 17 L.Ed.2d 189 (1966), they should be given first opportunity to consider them.

Additional authority for appellee's position may be found in: *Murdock* v. *City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1875); *Bailey* v. *Anderson,* 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945); *Street* v. *New York,* 394 U.S. 580, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

Appellant relies upon the cases of *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282, 42 S.Ct. 106 (1921),

and *Fiske* v. *Kansas*, 274 U.S. 380, 47 S.Ct. 655 (1926) to support the appeal jurisdiction of this Court to hear his case. Both of those decisions are distinguishable from the instant case as the constitutionality of the particular state statutes in issue was, in fact, seasonably raised at the first opportunity in the courts below and the state courts decided in favor of the validity of the particular statutes. Further, both of the cases cited by appellant to offer appeal jurisdiction support appellee's view that appellant's appeal should not lie because appellant has failed to focus his attack on the constitutionality of the particular application of statutes or rules by the trial court. Therefore, no substantial federal question is raised.

The Judgment of the Courts Below Rests on an Adequate Non-Federal Basis

Although appellant now seeks to claim a violation of his due process rights by the trial court's entry of a default judgment against him, appellant never availed himself of the procedural safeguards provided by and to the courts of Missouri. The decision of the Missouri Court of Appeals was based not on the merits of the trial court's entry of a default judgment but rather was based on the lack of jurisdiction in the trial court with respect to the motion and petition. It has been held repeatedly by this Court that review is precluded if a state's substantive law is sufficient to support the judgment—no matter how the federal question is resolved, *Murdock* v. *City of Memphis*, *supra*; *Fay* v. *Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), or if the state courts have found adequate procedural reasons for refusing to decide the federal question. *Henry* v. *Mississippi*, 379 U.S. 443, 85 S.Ct. 1322, 14 L.Ed.2d 263 (1965). The entry of the default judgment was on February 15, 1973 (Jurisdictional Statement, Appendix A, p. A7) and the motion and petition were filed

on August 5, 1975 and August 6, 1975 respectively. The motion was sustained on February 13, 1976 by the trial court and the Petition to Set Aside Judgment was sustained on April 5, 1976. The Missouri Court of Appeals found that the judgment was beyond the reach of the trial court to alter or vacate due to the great amount of time which had passed. The court below could not and did not examine appellant's contention of a due process violation.

> The allegations in the motion that might be perceived as asserting a meritorious defense or excusable neglect, which factors are considered in that class of cases exemplified by [citations omitted], are not pertinent or controlling here because, as stated, the judgment of February 15, 1973, was a final judgment when the motion was filed in August, 1975, and the trial court was without jurisdiction to alter or vacate that judgment [citations omitted]. (Jurisdictional Statement, Appendix A, p. A12)

The Missouri Court of Appeals then examined appellant's only other avenue to attack the default judgment, namely equity jurisdiction, and determined in a detailed analysis that such jurisdiction likewise must fail (Jurisdictional Statement, Appendix A, pp. A12-A17).

The ruling of the trial court, although discretionary, can no longer be questioned due to the fact of appellant's failure to avail himself of procedural safeguards. The courts below found a lack of compliance on the part of appellant and based their decision accordingly. This Court has often held that it will not substitute its interpretation of state procedure for that of the state courts. *Patterson* v. *Alabama*, 294 U.S. 600, 55 S.Ct. 575, 79 L.Ed. 1082 (1934). Assuming that this Court would decide that a substantial federal question is presented here, then it is

respectfully suggested that the appeal must fail due to the lack of compliance with established state procedure. The federal courts, like the courts of Missouri, restrict the time within which appeal may be taken as well as jurisdiction of the courts to alter or vacate judgments. If it were otherwise, then there could be no finality of judgments, no orderly administration of justice and no "definite point of time when litigation shall be at an end," *Matton Steamboat Co.* v. *Murphy,* 319 U.S. 412, 63 S.Ct. 1126, 87 L.Ed. 1483 (1943).

Appellee respectfully submits, therefore, even if a substantial federal question is found, the lower court's decision rests on an adequate non-federal basis and that the appeal should be dismissed. Further, appellee respectfully suggests that the question presented by appellant was conclusively settled by this Court in *Godsy* v. *Godsy* (Statement of Case, *supra,* pp. 2-3) decided three years ago. At that time this Court found no reasonable grounds to grant certiorari and it is submitted that appellant's question now presented for the second time to this Court has even less merit today. Accordingly, due to the total lack of substance of appellant's position, appellee, pursuant to 28 U.S.C. §2103 asks in addition to dismissal, for this Court to adjudge her reasonable damages for her delay as well as double her costs.

Respectfully submitted,

HOMER C. BITTIKER
THAINE Q. BLUMER
DEAN A. HODAPP
1801 Traders National Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106
Telephone: (816) 471-4881
Attorneys for Appellee

APPENDIX

APPENDIX A

Affidavit of Trial Counsel

AFFIDAVIT

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Robert C. Jones, after first being duly sworn upon his oath, states that he is the attorney of record for the defendant in the above matter and that this cause has been set for hearing on numerous occasions, some of which the defendant was not ready for trial, some of which the plaintiff was not ready for trial and so announced, and some of which both parties were ready for trial but the Court could not hear it because of the large docket of contested cases; that there had been numerous motions and hearings on said motions and that on or about the 10th day of January, 1972, the last time a motion was scheduled, both parties announced that they were ready to hear the motion but that as a result of conferences between the parties, it appeared that the entire matter could be worked out without the necessity of a hearing or trial and that both parties so advised the Court, and that following this time several conferences were held between the attorneys and several written proposals and counter-proposals were exchanged between the attorneys in an effort to resolve the matter; that at some time prior thereto the parties had agreed to a February 15th trial date but that during this period of negotiations and

following the parties' announcement to the Court that they believed the matter could be resolved without trial, the affiant addressed Miss Mary Wren, Domestic Relations Clerk, under date of January 23rd that it appeared the matter could be resolved without trial and to remove it from the docket, and with a tacit understanding of the parties the matter would not be tried this affiant made arrangements to be out of town on February 15th.

That accordingly the matter was removed from the trial docket as a contested divorce for February 15th, but that on said day the attorney for the plaintiff appeared in Court, and although negotiations toward settlement of the matter was still in progress, requested this Court to enter a default judgment against the defendant when he was not in Court and when the affiant, his attorney of record, was out of town and neither parties could present the defense to the plaintiff's action.

The above statement is true to the best of my information, knowledge and belief.

.....

Affiant

Subscribed and sworn to before me this ..... day of February, 1973.

.....

Notary Public

My Commission Expires: .....

APPENDIX B

Transcript of Proceedings in Chambers and Initial Proceedings in Open Court (Feb. 15, 1973)

(Page 6, line 23 through page 14, line 5)

On Thursday, February 15, 1973, the following proceedings were had and entered of record:

(The following proceedings were had IN CHAMBERS and entered of record.)

THE COURT: This is the case of Godsy vs. Godsy?

MR. SIMMS: Yes, Your Honor.

THE COURT: Plaintiff is here by counsel and defendant is appearing by Jack L. Simms.

MR. SIMMS: Your Honor, I am Jack L. Simms, and I am appearing in this matter especially for Mr. Robert C. Jones, attorney of record in this case. It is Mr. Jones' case, I know absolutely nothing about it. It has been pending for quite some time. It was imparted to me that there had been some sort of a settlement that had tentatively been accepted and that motions pertaining to the case were not argued on account of that; that immediately thereafter, Mr. Jones made arrangements to depart on a vacation and will return the first part of the week of the 19th, which I believe is Washington's birthday, and will be ready to try this case at any time thereafter.

I am requesting the Court at this time for a continuance of the case until Mr. Jones can return to handle and properly try the case. Mr. Jones has indicated to me in writing that he is the only one that is qualified, because of the background of the case to try it, and because of my physical condition, having just gotten out of the

Veterans Hospital, with double pneumonia, I am not in condition, nor am I familiar enough with the file to try the case, and I have been so instructed not to try cases by my personal physician. That is the record that I wish to make. We are talking about a matter of a few days. There is background in this case that I am not familiar with and I am requesting that the case be continued to be tried immediately upon return of Mr. Jones, the first part of the week.

MR. KRENSKY: Your Honor, the plaintiff opposes any application for continuance of the trial on the grounds that this case was set down for special hearing chosen by Mr. Jones. It was agreed upon by me at that time.

Mr. Jones stated that the day would be set aside, that there would be no further delay and that the matter would be disposed of at this time.

Previously, there has been six to eight continuances of this case over the past fourteen months. When this case was set, the Court further instructed the defendant to make certain child support payments and alimony payments and to return a car that he had taken that she had been previously using up until the time he took it. Since that time the man has paid nothing, has not returned the car and has told the plaintiff that he doesn't intend to pay anything. She will be an old woman before it is tried.

This very day the plaintiff has a banker under subpoena and the defendant telephoned Mr. Prouty and told him he didn't need to come to court because the matter wouldn't be heard and that he didn't need to worry about Mr. Krensky's subpoena because the matter would never be tried.

The settlement was a tentative settlement that was offered by the plaintiff and accepted by the defendant.

Subsequently three weeks afterwards the defendant had not acted upon it and at that time Mr. Jones and I had a discussion as to when he would act upon it and I was informed that it had fallen through even though it had been agreed upon.

Mr. Jones called Mary Wren and told her it was settled and to take it off the docket. I advised this court that the matter was not settled and should be left on the docket and sent a strongly worded letter to Mr. Jones to that effect.

We have made further attempts to get child support but there was no success and we have had no success in getting the automobile returned.

Last Thursday I received a letter from Mr. Jones stating he hoped I would not object to a continuance, that he was going on his winter vacation to Hawaii and I wrote him a letter and hand carried it to the office and it was placed in Mr. Jones' hands. He read it and made no comment and my letter said that I did not understand and opposed a continuance and that I would appear in court ready to try the matter and would urge the Court to allow us to try the matter.

I talked to Gene McDaniel on Monday and was informed by him that Mr. Jones had left town and I told Gene we would be here prepared to try the case.

This is not a statutory ground to continue a case because a lawyer is on vacation and from a personal standpoint I would not oppose a continuance for such reason had this matter not been delayed so many times in the past and I don't know when the plans materialized to take this vacation. The letter Mr. Jones sent me saying he was going on vacation was dated the 2nd and mailed on the 7th of February and I asked him about it; that we may have been able to advance the case up a week

and Mr. Jones said, "Well, that is the way it happens in this office. Things don't get mailed out promptly."

The plaintiff is suffering from want of money. She has received second and third notice of utilities being shut off, she is without a car, she owes the bank, the baby-sitter, she has borrowed money to live on. This matter will not get any better until it is tried.

MR. SIMMS: For the record, may I ask you a question based upon what we have talked about heretofore, and for my own self-satisfaction, had it been myself who requested this continuance and told you it would be tried the first part of next week, would you oppose that?

MR. KRENSKY: No.

MR. SIMMS: I believe that is all I have for the record, Your Honor.

THE COURT: What was your offer again?

MR. SIMMS: I asked him if it had been myself who requested the continuance and that it would be tried the first part of next week, would he oppose the continuance, and he said, "No."

MR. KRENSKY: I would take Jack's word if he said he would try this case next week or next month.

THE COURT: Gentlemen, the Court feels this matter should be tried. The record does reflect that it has been continued a number of times at the request of both parties. The case came from Independence on the 5th of December. The Court recalls the conference in chambers with the attorneys and at the bench where both the plaintiff and defendant were present and it was my understanding the defendant would bring up to date his child support payments, which at that time amounted to something like $1500.00. The order was made in court 1/29/72. He has not yet done it and he also promised he would share

some of these automobiles. He seems to me to be in contempt of the court. I think we should go ahead with the case if Mr. Krensky is demanding that it be heard today.

I am not blaming you, Mr. Simms. You can tell the others what we are going to do.

The Court will deny the request. I am going to hear it in the absence of the defendant. I don't believe he wants to have it heard. He isn't in good faith at all here and, as I understand it, the fellow is in a position to pay.

Mr. Hunsucker, there is a motion for your fees isn't there?

MR. HUNSUCKER: Yes, Your Honor, the temporary allowances was heard before Judge Randall and he made the child support and alimony allowances.

MR. SIMMS: Very well. Thank you, Your Honor.

BE IT REMEMBERED that heretofore on Thursday, February 15, 1973, the above cause came on regularly for hearing before the Honorable LEWIS W. CLYMER, Judge of Division No. 8 of the Circuit Court of Jackson County, Missouri, sitting as Division "B" of Domestic Relations.

The Plaintiff appeared in person and was represented by her attorney, Mr. Frank Krensky.

WHEREUPON, the following proceedings were had and entered of record:

THE COURT: This is the case of Godsy vs. Godsy, and the Court heretofore has allowed a record to be made in chambers at which time Mr. Jack Simms appeared on behalf of Mr. Jones, who is counsel of record for the defendant, and at that time requested a continuance. The

file reflects, of course, that Mr. Jones is not in the city and a letter is in here from him where he says he will be away and couldn't be here and that he is under the impression that a settlement would be reached.

On the other hand, Mr. Krensky says that is not so. The Court is not satisfied with the handling of this. It was set especially at this time at the agreement of both counsel and I expected him to be here. We excused Mr. Simms because of his illness and his unfamiliarity with the case and the request has been denied and the Court will proceed with hearing this case with the defendant not being present nor counsel being present.

MR. KRENSKY: Your Honor, at this time, there are some preliminary motions pending before the Court, can we dispose of them at this time?

THE COURT: All right.

APPENDIX C

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

NADINE GODSY,
Plaintiff,

vs.

SHERMAN M. GODSY, JR.,
Defendant.

Juvenile & Domestic Relations
Division No. 8

Circuit Court No. 749,413

Judgment Entry and Decree of Divorce

Comes now on this 15th day of February, 1973, the plaintiff by and through her attorneys, Frank S. Krenzky and James R. Hunsucker and the defendant by his attorneys, Jones & McDaniel, and Jack Sims, appearing before the Court and the Defendant by his attorney requested a continuance in the above styled matter. After an oral hearing in which the defendant by his attorney and the Plaintiff by her attorneys were heard, the Court refused to grant a continuance and ordered this matter for trial.

This cause having come on for a hearing and being submitted to the Court, and all evidence heard and being advised the premises, the Court disposed of preliminary motions now pending in this matter.

1. The motion of James R. Hunsucker, for attorney's fees was sustained by the evidence introduced. James R. Hunsucker was granted an attorney's fee in the amount of $4,320.00.

2. Defendant's motion to cite Plaintiff for contempt was denied and Defendant's Motion to Modify Custody also denied.

3. Motion for Contempt against the Defendant filed by the Plaintiff is considered moot and dismissed.

4. Plaintiff's Motion for Additional Temporary Alimony and Child Support is considered moot and dismissed.

5. Plaintiff's Motion to Strike Defendant's Pleading is sustained.

Evidence was heard on the Plaintiff's petition for a decree of Divorce and the Court after hearing the evidence and being satisfied that the Plaintiff was the innocent and injured party and was entitled to the relief prayed for in plaintiff's petition. ORDERS, ADJUDGES AND DECREES that plaintiff be and hereby is absolutely and forever divorced from the bonds of matrimony existing between the Plaintiff and Defendant. That plaintiff be awarded the care, control and custody of Gary S. Godsy, age (7) years the minor child born of the marriage. That the defendant is ordered to pay child support in behalf of the said minor child to the plaintiff in the sum of $150.00 per week; that the Defendant is ordered to pay the Plaintiff the sum of $100,000.00 alimony in gross; that the plaintiff is awarded attorney's fees in the amount of $5,-932.00 payable by the defendant; that the plaintiff is awarded suit money in the amount of $100.00 payable by the defendant. The defendant is granted privilege of reasonable visitation with Gary S. Godsy, the minor child of the marriage.

That costs be taxed against the defendant and execution shall issue therefor.

Dated this 15th day of February, 1973.

/s/ Lewis W. Clymer
Circuit Court Judge

APPENDIX D

IN THE CIRCUIT COURT OF MISSOURI,
SIXTEENTH JUDICIAL CIRCUIT

No. 749,413

NADINE GODSY,
Plaintiff,

vs.

SHERMAN M. GODSY, JR.,
Defendant.

Motion to Set Aside Judgment

COMES NOW Defendant, Sherman Godsy, Jr., by and through his attorneys, and for his Motion to Set Aside Judgment, alleges and states as follows:

1. That this motion is made pursuant to Rule 74.32 of the Rules of Civil Procedure, Supreme Court of Missouri. It is also made as a motion in the nature of coram nobis. It is also made to set aside the Judgment for fraud. Consideration is also asked of the Court by this motion under Rule 74.78, Rules of Civil Procedure, Supreme Court of Missouri.

2. That on or about February 15, 1973, this Court entered a purported Default Judgment against defendant. A copy of such Judgment Entry is marked Exhibit "A" and attached to this motion.

3. That this motion is made within three (3) years from the date the entry of purported Judgment was made.

4. That Rule 74.32 of the Missouri Rules of Civil Procedure permits the setting aside of any purported judg-

ment for irregularity within three (3) years after the rendition thereof, including but not limited to default judgments.

5. That through reference to the record of the trial and hearing of this cause and upon the face of the record, it appears that such purported Judgment was not made through timely and regular procedure, same being violations or misapplications of established rules of procedure, from want of adherence to prescribed rules and modes of proceeding, consisting of omitting to do something that is necessary for the due and orderly conduct of a suit or the doing of some act at an unreasonable time or in an improper manner.

6. That there was notice to defendant's counsel made by the Clerk of the Circuit Court of Jackson County, at the direction of plaintiff's counsel, that there was to be a "hearing" upon a "Motion to Modify" in this case on February 15, 1973. That there was on file in this matter plaintiff's motions for "Additional Temporary Alimony and Child Support" and Motion for Additional Temporary Attorney's Fees and Suit Money and Costs, which are motions to modify a previous order of this Court. *That, there were no other motions noticed up by plaintiff or the Circuit Clerk as appears from the face of the record. That, plaintiff's counsel as appears in the record of this case by letter* notified defendant's counsel that "Motions" were to be heard on the date for hearing.

7. That there was no notice of the entry of the Order and Judgment of this case as provided by Rule 74.78, Rules of Civil Procedure.

8. That the Judgment Entry and Transcript of this cause shows that no notice was ever given to defendant or his counsel.

9. That this Honorable Court exceeded its jurisdiction in rendering a default judgment against defendant; while plaintiff had noticed up motions to modify for February 15, 1973 and had such motions to modify on file, there was no notice to take up plaintiff's motion to strike pleadings filed with the Court on September 13, 1972. Moreover, plaintiff's motion to strike pleadings does not ask the Court to enter a default judgment against defendant as was done in this case. Moreover, the grounds stated in the Motion to Strike Pleadings were moot, and no amended pleadings were filed to reflect the grounds for such motion as testified to by plaintiff in the hearing held on February 15, 1973; that any purported "notice" of hearing on such motions was not in sufficient form to apprise defendant of what was to be heard on February 15, 1973.

10. That the failure to give adequate notice to defendant violated his rights under the due process clause of the Fourteenth Amendment to the United States Constitution and of Article I, Section 10 of the Missouri Constitution, which provide that no person shall be deprived of life, liberty or property without due process of law.

11. That there was no competent or adequate evidence before the Court on February 15, 1973 to permit the entry of the judgment against defendant, and no competent or adequate evidence to deny defendant's purported counsel's continuance.

12. That there is and was evidence outside the record of this cause to show the Court it should set aside the judgment of this cause, including records of the Office of Circuit Clerk, Jackson County, Missouri, showing no notice of a hearing on a default divorce or otherwise to permit the entry of the judgment herein was given to defendant or his purported attorney.

13. That there was in effect fraud in procuring such judgment in that defendant and his counsel were given to understand by plaintiff's counsel that there would be no hearing, that the matter was settled; that there was a settlement entered into by plaintiff and defendant which defendant was performing and intended to perform but which was willingly and intentionally violated by plaintiff and her counsel by having a hearing and by not adhering to the settlement agreement; that there were false representations made by plaintiff and her attorney to the effect that only motions to modify would be heard on February 15, 1973.

14. That as the record reflects, defendant had no attorney present at the hearing, was not afforded the right to be present with his attorney, all in violation of the Sixth and Fourteenth Amendments to the United States Constitution and of Article I, Section 10 and Article I, Section 14 of the Missouri Constitution, providing for Courts to be open to every person, and Article I, Section 18(a) in that plaintiff was in effect charging defendant with a crime.

15. That defendant was told by his counsel not to appear, thus did not appear for that reason, and is thus free from personal fault or negligence in connection with the entry of the judgment.

16. That there was a failure by defendant's counsel to properly represent defendant before the Court and that this constituted a fraud in the procurement of the judgment.

17. That the judgment was procured as the result of unavoidable accident or excusable mistake by defendant and the only reason he did not appear was because of the advice of counsel; that it was due to the inattention, lack of preparation, and lack of proper instruction and advice that defendant did not appear.

18. That there is no adequate remedy at law.

19. That defendant has a meritorious defense on all issues in this cause in that plaintiff has committed adultery with other men, is not the innocent party, is not a fit and proper person to have custody of the minor child born of the marriage; and further that:

(a) plaintiff was nagging and quarrelsome toward the defendant;

(b) plaintiff was naturally jealous of the defendant without justification or reason;

(c) plaintiff struck the defendant and threatened on numerous occasions to kill him;

(d) plaintiff was a spendthrift and not responsible in the handling of money;

(e) plaintiff was away from home for unexplained periods of time and associated improperly with other men;

(f) plaintiff drank alcoholic beverages in excess and was addicted to the use of drugs and narcotics;

(g) plaintiff on numerous occasions during the marriage took drugs in excess and threatened to kill herself and left numerous suicide notes and refused medical and psychiatric care sought to be given her by the defendant.

Respectfully submitted,

/s/ James R. Wyrsch
Henry H. Fox, Jr. and
James R. Wyrsch
1050 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Defendant

The undersigned certifies that a copy of the above and foregoing was delivered on this 5th day of August, 1975, to: THAINE Q. BLUMER, 2010 Traders National Bank Building, Kansas City, Missouri 64106, Attorney for Plaintiff.

/s/ James R. Wyrsch
Attorney for Defendant

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Sherman M. Godsy, Jr., Defendant herein, being first duly sworn on his oath, states that he has read the above and foregoing Motion to Set Aside Judgment, and that the facts contained therein are true and correct to the best of his knowledge and belief.

/s/ Sherman M. Godsy Jr.
Sherman M. Godsy, Jr.

Subscribed and sworn to before me this 5th day of August, 1975.

/s/ Charles B. Kaplar
(Seal) Notary Public

My commission expires: 12/3/77.

APPENDIX E

IN THE
CIRCUIT COURT OF MISSOURI
SIXTEENTH JUDICIAL CIRCUIT

No. DR75-4195

SHERMAN GODSY, JR.
Plaintiff,

vs.

NADINE GODSY,
Defendant.

Petition to Set Aside Judgment and for an Injunction

(Filed August 6, 1975)

COMES NOW Plaintiff, Sherman Godsy, Jr., by and through his attorneys, and for his Petition to Set Aside Judgment and for an Injunction, alleges and states as follows:

1. That on or about February 15, 1973, this Court entered a purported Default Judgment against plaintiff herein, defendant in Cause No. 749,413. A copy of such Judgment Entry is marked Exhibit "A" and attached to this motion.

2. That Rule 74.32 of the Missouri Rules of Civil Procedure permits the setting aside of any purported judgment for irregularity within three (3) years after the rendition thereof, including but not limited to default judgments.

3. That through reference to the record of the trial and hearing of said Cause No. 749,413 and upon the face

of the record, it appears that such purported Judgment was not made through timely and regular procedure, same being violations or misapplications of established rules of procedure, from want of adherence to prescribed rules and modes of proceeding, consisting of omitting to do something that is necessary for the due and orderly conduct of a suit or the doing of some act at an unreasonable time or in an improper manner.

4. That in said cause, there was notice to defendant's counsel made by the Clerk of the Circuit Court of Jackson County, at the direction of plaintiff's counsel, that there was to be a "hearing" upon a "Motion to Modify" in said cause on February 15, 1973. That there was on file in the matter plaintiff's motions for "Additional Temporary Alimony and Child Support" and Motion for Additional Temporary Attorney's Fees and Suit Money and Costs, which are motions to modify a previous order of this Court. *That, there were no other motions noticed up by plaintiff or the Circuit Clerk as appears from the face of the record. That, plaintiff's counsel as appears in the record of the case by letter* notified defendant's counsel that "Motions" were to be heard on the date for hearing.

5. That there was no notice of the entry of the Order and Judgment of said cause as provided by Rule 74.78, Rules of Civil Procedure.

6. That the Judgment Entry and Transcript of said cause shows that no notice was ever given to defendant (plaintiff herein) or his counsel in said cause.

7. That this Honorable Court exceeded its jurisdiction in rendering a default judgment in said cause against defendant (plaintiff herein); while plaintiff (defendant herein) had noticed up motions to modify for February 15, 1973

and had such motions to modify on file, there was no notice to take up plaintiff's motion to strike pleadings filed with the Court on September 13, 1972. Moreover, plaintiff's motion to strike pleadings does not ask the Court to enter a default judgment against defendant (plaintiff herein) as was done in this case. Moreover, the grounds stated in the Motion to Strike Pleadings were moot, and no amended pleadings were filed to reflect the grounds for such motion as testified to by plaintiff (defendant herein) in the hearing held on February 15, 1973; that any purported "notice" of hearing on such motions was not in sufficient form to apprise defendant (plaintiff herein) of what was to be heard on February 15, 1973.

8. That the failure to give adequate notice to the defendant in said cause (plaintiff herein) violated his rights under the due process clause of the Fourteenth Amendment to the United States Constitution and of Article I, Section 10 of the Missouri Constitution, which provide that no person shall be deprived of life, liberty or property without due process of law.

9. That there was no competent or adequate evidence before the Court on February 15, 1973 to permit the entry of the judgment against the defendant in that action (plaintiff herein), and no competent or adequate evidence to deny defendant's purported counsel's continuance in said cause.

10. That there is and was evidence outside the record of said cause to show the Court it should set aside the judgment of said Cause No. 749,413, including records of the Office of Circuit Clerk, Jackson County, Missouri, showing no notice of a hearing on a default divorce or otherwise to permit the entry of the judgment herein was given to defendant in said cause (plaintiff herein) or his purported attorney.

11. That there was in effect fraud in procuring such judgment in that defendant (plaintiff herein) and his counsel were given to understand by plaintiff's (defendant herein) counsel that there would be no hearing, that the matter was settled; that there was a settlement entered into by plaintiff and defendant which defendant (plaintiff herein) was performing and intended to perform but which was willingly and intentionally violated by plaintiff (defendant herein) and her counsel by having a hearing and by not adhering to the settlement agreement; that there were false representations made by plaintiff (defendant herein) and her attorney to the effect that only motions to modify would be heard on February 15, 1973.

12. That as the record reflects, defendant (plaintiff herein) had no attorney present at the hearing, was not afforded the right to be present with his attorney, all in violation of the Sixth and Fourteenth Amendments to the United States Constitution and of Article I, Section 10 and Article I, Section 14 of the Missouri Constitution, providing for Courts to be open to every person, and Article I, Section 18(a) in that plaintiff (defendant herein) was in effect charging defendant (plaintiff herein) with a crime.

13. That defendant (plaintiff herein) was told by his counsel not to appear, thus did not appear for that reason, and is thus free from personal fault or negligence in connection with the entry of the judgment.

14. That there was a failure by defendant's (plaintiff herein) counsel to properly represent defendant (plaintiff herein) before the Court and that this constituted a fraud in the procurement of the judgment.

15. That the judgment was procured as the result of unavoidable accident or excusable mistake by defendant

(plaintiff herein) and the only reason he did not appear was because of the advice of counsel; that it was due to the inattention, lack of preparation, and lack of proper instruction and advice that defendant (plaintiff herein) did not appear.

16. That there is no adequate remedy at law.

17. That plaintiff has a meritorious defense on all issues in this cause in that defendant has committed adultery with other men, is not the innocent party, is not a fit and proper person to have custody of the minor child born of the marriage; and further that:

(a) defendant was nagging and quarrelsome toward the plaintiff;

(b) defendant was naturally jealous of the plaintiff without justification or reason;

(c) defendant struck the plaintiff and threatened on numerous occasions to kill him;

(d) defendant was a spendthrift and not responsible in the handling of money;

(e) defendant was away from home for unexplained periods of time and associated improperly with other men;

(f) defendant drank alcoholic beverages in excess and was addicted to the use of drugs and narcotics;

(g) defendant on numerous occasions during the marriage took drugs in excess and threatened to kill herself and left numerous suicide notes and refused medical and psychiatric care sought to be given her by the plaintiff.

18. That defendant has caused various attachments, levies, executions and sales of plaintiff's property in which he has an interest, including but not limited to the following described real estate:

Real estate situated in Jackson County, Missouri, described as follows: The Southwest 1/4 of the Northwest 1/4 of Section 33, Township 49, Range 31, EXCEPT THE West 260 feet thereof,

Part of Sections 32 and 33, Township 49, Range 31, described as follows: Beginning at the Northeast corner of the Northwest 1/4 of the Northwest 1/4 of Section 33, Township 49, Range 31; thence South 1314 feet to the Southeast corner thereof; thence West 1059.14 feet to a point 260 feet East of the Southwest corner of said 1/4 1/4 section; thence North parallel to the West line of said 1/4 1/4 section, 295 feet; thence West parallel to the South line of said 1/4 1/4 section and its prolongation thereof, 454.3 feet to a point on the East line of Fairview Road (40 feet from the centerline thereof), thence in a Northeasterly direction along the East line of said right of way and along a curve to the right (having a radius of 419.28 feet) 283.00 feet to the point of tangent; thence North 40 degrees 25 feet East along said right of way 82.84 feet to the point of curve; thence in a Northeasterly direction along the East line of said right of way and along a curve to the left (having a radius of 481.68 feet) 191.11 feet; thence East 194.48 feet to a point on the Northerly line of the Old County Road (25 feet from the center line thereof); thence along the Northerly line of said right of way as follows: Southeasterly along a curve to the left (having a radius of 290.7 feet) 17.59 feet to the point of tangent; thence South 64 degrees 41 feet East

109.43 feet to the point of curve; thence Southeasterly along a curve to the left (having a radius of 226.04 feet) 69.56 feet to the point of tangent; thence South 82 degrees 19 feet East 79.94 feet to the point of the curve; thence Easterly along a curve to the left (having a radius of 300.7 feet) 81.35 feet to the point of tangent; thence North 82 degrees 11 feet East 64.59 feet to the point of curve; thence Northeasterly along a curve to the left (having a radius of 138.46 feet) 60.64 feet to the point of tangent; thence North 57 degrees 05 feet East, 169.64 feet to the point of curve; thence Northeasterly along a curve to the left (having a radius of 2832.10 feet) 24.16 feet; thence North parallel to the East line of said 1/4 1/4 section, 480.8 feet; thence East along the North line of said 1/4 1/4 section 450 feet to the point of beginning, Jackson County, Missouri.

19. That said sale is now set for August 8, 1975, at 2:00 P.M.

20. That although said property lies within the Independence jurisdiction of the Court, and defendant intends to sell it in Independence, the publication as stated only relates to downtown Jackson County.

WHEREFORE, the premises considered, plaintiff respectfully prays that the Court issue its order setting aside the Judgment and holding it for naught, that this Honorable Court issue a temporary restraining order against any further attachments, levies, sales or garnishments, that this Court issue a permanent injunction against any further attachments, levies, sales or garnishments, that defendant be enjoined and restrained from conveying the aforementioned real estate until some further order be made in the premises by this Court, and for such other and

further relief as may be just and equitable, including the costs of this action.

Respectfully submitted,

/s/ James R. Wyrsch
Henry H. Fox, Jr. and
James R. Wyrsch
1050 Home Savings Building
Kansas City, Missouri 64106
Attorneys for Plaintiff

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

SHERMAN M. GODSY, JR., plaintiff herein, being first duly sworn on his oath, states that he has read the above and foregoing Petition to Set Aside Judgment and for an Injunction, and that the facts contained therein are true and correct to the best of his knowledge and belief.

/s/ Sherman M. Godsy, Jr.
Sherman M. Godsy, Jr.

Subscribed and sworn to before me this 5th day of August, 1975.

/s/ Joyce Meredith
Notary Public

My commission expires: 3/28/79.

APPENDIX F

Rule 61.01, Rules of Civil Procedure, Supreme Court of Missouri

RULE 61. ENFORCEMENT OF DISCOVERY BY PARTIES

61.01 Motion for Order Compelling Discovery

(a) Motion to Compel Answer—Costs of. Upon the refusal of a party to answer any interrogatory submitted under Rule 56, the proponent of the question may move the court, on reasonable notice to all persons affected thereby, for an order compelling an answer. If the motion is granted and if the court finds that the refusal was without substantial justification, the court shall require the refusing party to pay to the examining party the amount of the court costs incurred in obtaining the order. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party to pay to the refusing party the amount of the court costs incurred in opposing the motion.

(b) Refusal to Obey—Consequences of. If any party, or if an officer, director, general manager, managing agent or partner thereof refuses to obey any order made under paragraph (a) of this Rule requiring him to answer designated questions, or an order made under Rule 58 to produce any document or other thing for inspection, copying or photographing, or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 60, requiring him to submit to a physical or mental examination, the court may make such orders

in regard to the refusal as are just, and among others the following:

(1) An order that the matters regarding which the questions were asked or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(3) An order striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(c) Refusal to Make Admission—Consequences of. If a party, after being served with a request under Rule 59 to admit the genuineness of any relevant documents or the truth of any relevant and material matters of fact, files and serves a written sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) Willful Failure to Appear—Consequences of. If a party, or if the party served is a public or private corporation, a partnership or other unincorporated association, an officer, director, general manager or managing agent or partner thereof, willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to return answers to interrogatories submitted under Rule 56, after proper service of such interrogatories, the court on motion and notice may strike out all or part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

(Amended March 6, 1962, eff. Oct. 1, 1962.)

APPENDIX G

Rule 65.03, Missouri Rules of Civil Procedure

65.03 Application for Continuance, How Made

An application for a continuance shall be made by a written motion accompanied by the affidavit of the applicant or some other credible person setting forth the facts upon which the application is based, unless the adverse party consents that the application for continuance may be made orally.

APPENDIX H

Rule 65.01, Missouri Rules of Civil Procedure

65.01 Court May Continue a Civil Action to a Fixed Day

For good cause shown, the court may continue a civil action to a fixed day, or to a date for trial to be set thereafter. Every continuance granted on the application of a party may be at the cost of such party, if so ordered by the court.